Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT F. DVORAK,

Petitioner,

v.

UNITED STATES GOVERNMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the imposition of an increased sentence for alleged perjury at trial violates Federal Rule of Criminal Procedure 32 and *Burns v. United States*, 501 U.S. 87 (1993) when the defendant receives no notice before the day of sentencing about which testimony constitutes the alleged perjury.

2. Whether a criminal defendant has been deprived of due process when the court imposes an increased sentence for his alleged perjury at trial when the defendant received no notice before the day of sentencing of the possible increase on that basis.

3. Whether the Fourth Circuit erroneously affirmed the district court's refusal to instruct the jury that a defendant's good faith belief in the propriety of his actions constitutes a complete defense to charges of wire fraud and false statements, when the proposed instruction was warranted by the evidence and the Fourth Circuit's ruling conflicts with the law in other circuits.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below: Robert F. Dvorak, Defendant; and the United States of America, represented by Stephen P. Learned, Assistant United States Attorney for the Eastern District of Virginia, and Dabney Langhorne, Assistant United States Attorney for the Eastern District of Virginia.

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BRIEF FOR PETITIONER

Robert F. Dvorak, through undersigned counsel, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed defendant's conviction by unpublished opinion dated October 17, 2000. Mr. Dvorak seeks review of two aspects of the judgment: the imposition of an enhanced sentence under the Federal Sentencing Guidelines for his supposed perjury at trial, and the trial court's erroneous refusal to instruct the jury that good faith was a complete defense to the charges of false statements and wire fraud.

First, Mr. Dvorak seeks review of the district court's imposition of a two-level sentencing enhancement for alleged obstruction of justice on the grounds of alleged perjury because (1) Mr. Dvorak did not receive notice before sentencing of what portion of his testimony was perjurious, in violation of Fed. R. Crim. P. 32 and *Burns v. United States*, 501 U.S. 129 (1991); and (2) Mr. Dvorak was deprived of his right to due process because he did not receive notice about which testimony constituted the alleged perjury. The Fourth Circuit decided an important federal question concerning the Federal Sentencing Guidelines that conflicts with relevant decisions of this Court and those of other circuit courts and deprived Mr. Dvorak of his right to due process under the Fifth Amendment to the United States Constitution.

Mr. Dvorak also seeks review of the district court's refusal to instruct the jury that Mr. Dvorak's good faith belief in the propriety of his actions constituted a complete defense to the charges of violating the wire fraud (18 U.S.C. § 1343) and false statements (18 U.S.C. § 1001) statutes. The instruction would have provided crucial guidance to the jury on the central proposition of the defense, namely that Mr. Dvorak honestly, even if mistakenly, believed that he was engaged in legitimate business transactions with a representative of the Drug Enforcement Administration

("DEA"). Mr. Dvorak requested an appropriate instruction before trial; the evidence supported the instruction; and the government did not object to the giving or the wording of the instruction. This issue warrants review by the Supreme Court because the Fourth Circuit's decision conflicts with established precedent requiring an instruction to the jury on the defendant's defense and conflicts with the law in other circuits requiring the giving of a good faith instruction under the circumstances of this case. This Court should grant Mr. Dvorak's Petition for a Writ of Certiorari.

OPINIONS BELOW

None of the opinions and orders at issue is published. The Final Judgment in a Criminal Case, dated April 28, 2000, as amended on May 4, 2000, is contained in the Supreme Court Appendix ("A.") at 4a-21a.[1] The Findings and Reasons of the Court Regarding Presentence Report dated April 28, 2000 may be found in the Appendix 23a-25a. The Fourth Circuit's order affirming the conviction dated October 17, 2000 is an unpublished disposition which may be found at 2000 WL 1532904 and is also found at A. 1a-3a.

JURISDICTION

The Judgment of the Fourth Circuit Court of Appeals was issued on October 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (l).

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[1] "A." refers to Volume I of the Appendix filed in this Court. "F.C.A." refers to the Fourth Circuit Appendix that contains the record filed with Fourth Circuit below, and refers to citations not included in the Supreme Court Appendix. "Sealed A." refers to the Volume II of the Appendix filed in this Court, which contains confidential materials related to sentencing filed in the Fourth Circuit that were sealed by the Fourth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions at issue are reproduced in the Appendix at Volume I, pages 66a-86a. These provisions include the relevant Federal Sentencing Guidelines.

STATEMENT OF THE CASE

This case arises out of a judgment of conviction of defendant Robert F. Dvorak in the United States District Court for the Eastern District of Virginia, and a subsequent appeal. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The indictment alleged that Mr. Dvorak conspired with Robert Burchell ("Burchell"), then an employee of the DEA, to defraud the United States by enabling Mr. Burchell to embezzle equipment that the DEA purchased from Ritz Audio Visual Associates ("Ritz"), a company of which Mr. Dvorak owned 40%. Ritz is a small business that sells audio-visual equipment and services to a variety of commercial and governmental customers. (F.C.A. 495-498; Sealed A. 17a-18a).

The indictment also charged Mr. Dvorak with fourteen counts of false statements under 18 U.S.C. § 1001 for submitting false invoices to the DEA, 4 counts under 18 U.S.C. § 1343 for similar conduct, and one count under 18 U.S.C. § 371 for conspiracy. The indictment alleged that the false invoices concealed the embezzlement scheme from the DEA. Following guilty verdicts on all counts, the court sentenced Mr. Dvorak to thirty-seven months as to each count to be served concurrently. (A. 6a). The Court of Appeals of the Fourth Circuit affirmed Mr. Dvorak's conviction by unpublished per curiam opinion on October 17, 2000. (A. 1a-3a).

FACTS RELEVANT TO THIS PETITION

The critical disputed issue at trial was whether Mr. Dvorak knew that Burchell or others were stealing from the DEA and whether he joined in that effort. There was no dispute at trial that Ritz had sold the items to the DEA and no dispute that Burchell or his accomplices had stolen some of them. The government's evidence consisted exclusively of circumstantial evidence drawn from the documents and the transactions and the testimony of discredited conspiratorial mastermind, Robert Burchell.

A. The Government's Evidence

1. Robert Burchell's Scheme at the Drug Enforcement Administration

The government's case rested almost solely on the testimony of Burchell, who, despite his position of responsibility at the DEA, led a nine-year scheme to embezzle more than $2.6 million worth of goods from the DEA. (F.C.A. 153, 276). He ordered goods from outside vendors using standard DEA purchase orders, received the goods himself, certified that the DEA had received them, and arranged for the DEA to pay for the goods. Burchell either kept the goods or sold them. Eventually apprehended, he pled guilty in July 1998 and now is serving a 40-month prison sentence. (F.C.A. 151, 273-275).

Burchell took elaborate steps to conceal his embezzlement scheme, including the preparation of false internal paperwork at the DEA and the creation of vague purchase orders to send to outside vendors. Burchell or other DEA employees would certify falsely that the DEA, rather than Burchell, had received the items. (F.C.A. 279). Burchell himself approved invoices submitted for payment to the DEA. (F.C.A. 161, 228). Burchell's scheme exploited the government's strict requirement that vendor invoices match government purchase orders. Burchell issued purchase orders that contained vague descriptions. The vendor's invoice thus

had to contain a matching, albeit vague, description of the items provided to the government. The DEA would not pay invoices that did not match the purchase order. Every government agency insists on this kind of matching. (F.C.A. 398-399, 402).

2. Burchell's Dealings With Mr. Dvorak's Company, Ritz Audio Visual

In 1993, Burchell began to purchase items from Ritz, which Burchell picked out of the Yellow Pages. Although Burchell dealt originally with Mr. Dvorak's partner, Gary Lunsford, he soon began to transact business almost exclusively with Mr. Dvorak. Unbeknownst to Lunsford or Dvorak, Burchell was embezzling these items. Consistent with government purchasing policy, Burchell insisted that the invoice sent to the DEA had to match the purchase order provided to Ritz. (F.C.A. 39). Lunsford and Dvorak complied with Burchell's instructions and wrote the Ritz invoice to match the DEA purchase order.

Ritz, which did business with over 50 government agencies, had received similar instructions from other agencies, which "quite often" insisted that the invoice had to match the purchase order or insisted that an invoice be written in a particular way. (F.C.A. 398-399, 402). Ritz's credit manager testified that the government often would refuse to pay the bill if the invoice did not match the purchase order. (F.C.A. 465-468, 873-886). Burchell and a government auditor testified to the same practice. (F.C.A. 294, 432).

Burchell began to transact business with Ritz exclusively through Mr. Dvorak. Burchell would order merchandise by telephone and then would issue purchase orders, signed by other persons, that contained vague or incomplete descriptions (F.C.A. 514-515). Following Burchell's instructions, Mr. Dvorak issued matching invoices. When Mr. Dvorak submitted invoices that included more detail than the purchase order, Burchell rejected them and told Mr. Dvorak that the invoices had to match. (F.C.A. 517-521,

526-528, 532, 1246, 1285). Burchell insisted on vague purchases even for wholly legitimate purchases, such as the installation of antennas at the DEA headquarters. (F.C.A. 527-533, 1246, 1285).

Burchell ordered a variety of items from Ritz between March 1993 and September 1997, including video projectors, audio equipment, cameras, camcorders, and computer monitors. He also purchased items such as a lawn tractor, a jet ski, a whirlpool, and thousands of dollars worth of music CD-ROMs and movie laser discs. Burchell purchased virtually all of them by causing DEA purchase orders to be issued for the purchases, certifying DEA's receipt of the goods, and approving the issuance of a government check for the items. (F.C.A. 173, 295-296, 514-515).

Burchell provided no direct evidence that Mr. Dvorak knew that Burchell was stealing any of the items. Burchell did not tell Mr. Dvorak that he was stealing any of the items. He did not pay kickbacks to Mr. Dvorak nor arrange for him to share in any of the profits from Burchell's sale of the stolen items. (F.C.A. 316, 569).

Burchell was substantially impeached with his plea agreement and the prospect of further reductions in his sentence as a reward for his testimony. He acknowledged he had been stealing from the DEA since 1988, long before he ever met Mr. Dvorak. (F.C.A. 275-277). He admitted that he falsified internal and external documents and lied repeatedly to other DEA employees. Burchell admitted that he had not been truthful in his debriefing sessions with the prosecutor and the FBI agents. (F.C.A. 285-290). The trial judge noted that Burchell admitted "stealing, lying and being a crook." (F.C.A. 285).

B. The Defendant's Evidence

Mr. Dvorak unequivocally testified that he did not join the conspiracy, and that he did not think that he was cheating the DEA, or that Burchell was stealing from the DEA. (F.C.A. 569-570). Mr. Dvorak testified that Burchell specifically told

him that the DEA needed Ritz's help and Mr. Dvorak thought he was helping the DEA. (F.C.A. 510, 536-537, 538-540, 547, 558). Mr. Dvorak thought that Burchell was involved in supplying DEA undercover operations or ordering DEA supplies. Burchell admitted that he made purchases for DEA undercover operations, and that the DEA created "front" companies, such as stockbrokers, and check cashing companies as undercover operations. (F.C.A. 306-308). Mr. Dvorak learned that Burchell had shown a Ritz employee a DEA workshop where surveillance equipment was being installed into pinball machines and arcade machines. Furthermore, Mr. Dvorak's brother, Charles, a former CIA employee told him that items such as those being ordered by the DEA were used for people on hardship posts and for bribes and that it was not unusual for the DEA to be purchasing them. (F.C.A. 488-491). Charles told Robert that as long as the agency issued a purchase order for the goods, the purchases were unremarkable. (F.C.A. 490).

C. Request for Instruction That Good Faith Belief Is a Complete Defense

Mr. Dvorak requested an instruction that good faith was a complete defense to the false statements and wire fraud charges. (A. 89a). The government did not object. Nevertheless, the court simply declined to give this instruction, stating only that "it seems to me that an appropriate instruction on willfulness and the requirement of willfulness and knowingly is adequate." (A. 89a).

Proof of each of the three crimes with which Mr. Dvorak was charged required the government to prove that he had acted willfully. The court defined "willfulness" and knowingly" in the following instruction:

> The term willfully is used. To act willfully is to act voluntarily and intentionally and with a specific intent to do something the law forbids; that is, with a bad purpose, to either disobey or disregard the law. To act knowingly is to act voluntarily and

> intentionally and not because of a mistake or accident or other innocent reason.

(A. 91a)

D. Mr. Dvorak's Sentencing

Prior to sentencing, the United States Probation office issued a Presentence Report, which proposed an enhancement for obstruction of justice because:

> The defendant obstructed justice in this case and has been given a two level enhancement accordingly. He denied his guilt under oath, contradicted testimony by Burchell found by the jury to be truthful, and he failed to fully disclose documents to the grand jury when directed to do so. Regarding the latter element of the obstructive behavior, the defendant produced requested Ritz documents to the grand jury in 1998 but did not include the invoice and purchase order for transaction 18 which was the first clear fraudulent purchase (laser disks). The defendant has maintained that he never saw these documents and never had them in his possession. He could provide no explanation for the later emergence of these documents, and could not explain the internal Ritz order form for that same transaction that noted in his handwriting, "copy of purchase order never received."

(Sealed A. 14a).

The Probation Officer identified no specific element of testimony that Mr. Dvorak lied under oath.

Mr. Dvorak, through counsel, timely objected to the obstruction of justice enhancement on the grounds that Mr. Dvorak's mere denial of guilt in his testimony could not support such an enhancement; that the jury could have found that Mr. Dvorak did not lie, but nevertheless concluded that he knew enough about Burchell's actions that he acted with the requisite criminal knowledge, or displayed willful

blindness; and that the government was speculating that Mr. Dvorak destroyed the referenced document, offered no proof that the destruction, in fact, had happened, and that it was more likely that Burchell himself, an admitted forger, fabricated the DEA document in the DEA files. (Sealed A. 47a-48a). Mr. Dvorak pointed out that "the PSR identifies no specific testimony that was supposedly false." (Sealed A. 48a). The government did not respond to these objections. (Sealed A. 76a-82a).

The Probation Officer issued an Addendum to the Presentence Report, focusing on alleged document destruction:

> there is enough evidence available to conclude that the defendant provided untruthful testimony regarding Government Ex. 18.1. Discrepancies surrounding this document were clear during trial testimony and the jury ultimately found the defendant guilty. The enhancement was not given based simply on the defendant's denial of guilt, but his elaboration, determined to be untrue, about questionable documents and procedures during sales between Ritz and the DEA. Further, the defendant failed to turn over the document referred to in Exhibit 18, as ordered by the FBI. While he has maintained that the document did not exist, it was ultimately provided to the government by the DEA.

(Sealed A. 80a).

The Addendum did not discuss perjury, focusing instead on alleged discrepancies concerning Government's Exhibit 18.1, and conclusory statements about Mr. Dvorak's "elaboration, determined to be untrue, about questionable documents and procedures during sales between Ritz and the DEA." (Sealed A. 80a).

The government's sentencing memorandum focused only on the "evidence" of the alleged removal of a document

from the Ritz files and identified no evidentiary basis for any enhancement based on supposed perjured testimony. (A. 148a-186a). The government's supplemental memorandum, filed in response to Mr. Dvorak's memorandum objecting to any enhancement based on document destruction, identified no specific instances of allegedly false testimony. (A. 187a-219a, 220a-224a). In his memorandum, Mr. Dvorak specifically asked that the "Court require the government to produce evidence at the sentencing hearing regarding the recommended enhancement." (A. 195a)

At the sentencing hearing, the court rejected the argument that an obstruction of justice enhancement could rest on "the failure to, on the document that allegedly was not produced in response to the subpoena." (A. 37a). The court added, however,

> But I do think there is a legitimate issue whether he took the stand and lied, and that would be, if I find an obstruction of justice enhancement appropriate, it would be on that prong that is mentioned in the Presentence report.

(A. 37a) (emphasis added).

Counsel for the defendant objected at the sentencing hearing to the lack of notice about the potential enhancement based on perjury. (A. 37a). Once the district court stated it would not rely on document destruction, defense counsel pointed out that the government had not argued the perjury point. There remained a "question of notice to Mr. Dvorak about precisely what was the false testimony that he was supposed to have given." (A. 37a). Counsel argued further that there was no necessary contradiction between the testimony of Burchell and Dvorak, but that the jury found Mr. Dvorak had been willfully blind and thus had the requisite knowledge. (A. 38a-39a, 53a).

The prosecutor argued that a perjury enhancement was justified because Mr. Dvorak contradicted Burchell's testimony concerning one alleged conversation between them.

(A. 52a). This particular instance of alleged perjury was not mentioned in the Presentence Report, or anywhere in the government's sentencing memorandum. Apparently taken by surprise by the court's focus on perjury, the government presented no other specifics, adding only that "there are numerous instances, Your Honor, that was just direct testimony, you know, in direct contradiction to what Burchell said. So we think that obstruction, this is a clear case of it." (A. 52a).

In ruling, the court did not rely on the prosecutor's example. Instead, the court stated:

> The obstruction of justice enhancement is in my opinion warranted, because I find that the defendant's statement that he was not only unaware of the deviousness and culpability of Burchell, but indeed he thought, to the contrary, that these were perfectly legitimate purchases for the DEA to be both false and material.
>
> This is not just the defendant against the word of Burchell. This was false testimony, and it was the testimony that centered on the real issue in the case. There wasn't any question there had been embezzlement. The only real question as far as this defendant was concerned is whether he knew of it and participated in it, and in my opinion his statement that he did not know it was false and was material in that it was the basis upon which the jury, or could have been the basis on which the jury acquitted him. So that enhancement is justified.

(A. 56a-57a). The court's stated basis for the obstruction of justice enhancement appeared nowhere in any of the pre-sentence submissions or filings, and the court otherwise gave no notice to the defendant that it intended to enhance Mr. Dvorak's sentence on these grounds. The court's post-sentencing ruling stated "The court finds an obstruction of

justice enhancement appropriate for giving false material testimony at trial." (A. 23a).

ARGUMENT

A. Fed. R. Crim. P. 32 Requires Notice of the Factual Basis for an Adjustment Based on Perjury

The Sentencing Reform Act of 1984, which "revolutionized" sentencing in the federal courts, *Burns v. United States*, 501 U.S. 129, 131 (1991), requires the imposition of sentences in accordance with the Federal Sentencing Guidelines (the "Guidelines"). The Guidelines provide certain presumptive sentences within statutory limits. "A district court must impose a sentence within the applicable Guideline range, if it finds the case to be a typical one." *Koon v. United States*, 518 U.S. 81, 85 (1996). The district court first determines the applicable guideline section and a "base offense level" under Chapter Two of the Guidelines. USSG § 1B1.1 (a),(b). Having made this initial determination, the district court then must "apply the adjustments as appropriate related to victim, role, and obstruction of justice" from Chapter Three.[2] § 1B1.2(c). The guidelines permit an upward adjustment for obstruction of justice where the district court finds that a defendant has perjured himself during trial. USSG § 3C1.1; *United States v. Dunnigan*, 507 U.S. 87, 88-89 (1993). Once the court arrives at a presumptive sentence, the district court may "depart" either upward or downward if the case is outside the "heartland" of cases to which that guideline applies. USSG § 1A4(b), p.s.; *Koon*, 518 U.S. at 94-95, 98-99.

This Court held in *Burns* that Fed. R. Crim. P. 32 requires notice to a defendant of a possible upward departure under the Sentencing Guidelines. *Burns*, 501 U.S. at 138

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[2] There are other adjustments within Chapter Three for grouping of multiple counts and acceptance of responsibility that are not relevant to this case. USSG § 1B1.1(d)(e).

("before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling.") Moreover, the "notice must specifically identify the ground on which the district court is contemplating an upward departure." *Id.*[3]

While the circuits agree that *Burns* applies to departures, the circuits are split as to whether the *Burns* notice extends to adjustments or enhancements. The Second, Seventh and Ninth Circuits have interpreted *Burns* to require notice for proposed adjustments or enhancements under the Guidelines.[4]

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[3] The circuits that have addressed this issue have adopted *Burns* as requiring notice for both upward and downward departures. *See, e.g., United States v. Mangone*, 105 F.3d 29 (1st Cir. 1997); *United States v. Medford*, 194 F.3d 641 (3rd Cir. 1999)(upward departure); *United States v. Barr*, 963 F.2d 641 (3d Cir. 1992)(same); *United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995) (upward and downward departures); *United States v. Maxton*, 940 F.2d 103 (4th Cir. 1991) (upward departure); *U.S. v. Otis*, 107 F.3d 487 (7th Cir. 1997); *United States v. Valentine*, 21 F.3d 395 (11th Cir. 1994) (upward departure); *United States v. Alba*, 933 F.2d 1117 (2nd Cir. 1991)(downward departure); *United States v. Pankhurst*, 118 F.3d 345 (5th Cir. 1997); *United States v. Andruska*, 964 F.2d 640 (7th Cir. 1992)(downward departure); and *United States v. Green*, 105 F.3d 1321 (9th Cir. 1997).

[4] *See, e.g., United States v. Zapatka*, 44 F.3d 112, 115-16 (2d Cir. 1994)(extending notice requirement to adjustments where it was not recommended by PSR, a factual dispute existed as to defendant's conduct, and it was unclear which guideline warranted the adjustment); *United States v. Jackson*, 32 F.3d 1101, 1105-06 (7th Cir. 1994) (requiring reasonable notice that court intends to enhance sentence); and *United States v. Brady*, 928 F.2d 844, 847 n. 3 (9th Cir. 1991), abrogated on other grounds, *Nichols v. United States*, 511 U.S. 738, (1994)(adequate notice required not only for departures but for an adjustment to the base offense level). *See also United States v. Thomas*, 969 F.2d 352, 356 n. 2 (7th Cir. 1992)(while *Burns* does not require notice of enhancements, Fed. R. Crim. P. 32 requires that a defendant receive some notice of enhancements). The Third Circuit has also stated that a "District Court ... [cannot] ... impose [an] adjustment unless the parties [are] notified and been given an

The First, Fifth, Sixth, and Eighth Circuits have held, however, that no notice of the grounds for an adjustment or enhancement is required.[5]

The Fourth Circuit apparently has joined the First, Fifth and Eighth Circuits in rejecting any requirement of notice about adjustments. Although there are no published decisions on this point, the Fourth Circuit has stated in an unpublished disposition that "Rule 32 and *Burns* do not require advance notice of sua sponte adjustments to the guideline calculation, at least where the facts relevant to the adjustment are known to the defendant, because the bases for adjustments are limited and are set out in the guidelines." *United States v. Rucker*, 122 F.3d 1064, 1997 WL 564144 (4th Cir.)(Table Decision),

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opportunity to brief the issue prior to sentencing." *United States v. Mackins*, 218 F.3d 263, 269 (3rd Cir. 2000).

[5] *United States v. Canada*, 960 F.2d 263, 266-267 (1st Cir. 1992) (reading *Burns* to require special notice only for departures from the Guidelines' sentencing range rather than for all Guidelines adjustments); *United States v. Knight*, 76 F.3d 86, 88 (5th Cir. 1996); *United States v. Guthrie*, 144 F.3d 1006 (6th Cir. 1998) (declining to extend Burns to enhancements); and *United States v. Willis*, 997 F.2d 407 (8th Cir. 1993) (no prior notice required before imposing enhancement for obstruction of justice). *See also United States v. Adipietro*, 983 F.2d 1468 (8th Cir. 1993)(*Burns* does not mandate that adequate notice must be given before a district court addresses an adjustment or enhancement). These courts reason that the delineation of adjustments in Sentencing Guidelines themselves provides notice to defendants of possible grounds for adjustment, at least where the facts relevant to the adjustment are known to the defendant. *See e.g., Canada*, 960 F.2d at 266 (guidelines themselves give defendant all the notice required regarding any adjustment a district court contemplates imposing); *Knight*, 76 F.3d at 88 ("at least if the defendant has actual notice of the fact on which the district court bases an enhancement or a denial of a reduction, the Sentencing Guidelines themselves provide notice of grounds relevant to the proceeding sufficient to satisfy the requirements of Rule 32 and USSG § 6A1.3); *Hayes*, 171 F.3d at 392 ("a defendant, of course, is on notice of the contents of the Guidelines"); and *Willis*, 997 F.2d at 415 (Guidelines provided defendant of notice of the potential bases for enhancement).

citing *Knight*, 76 F.3d at 88; *Willis*, 997 F.2d at 416-417; and *Canada*, 960 F.2d at 265-68.

Burns explains that notice of an upward departure is important to permit "full adversary testing of the issues relevant to a Guidelines sentence" so that the parties have "'an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.'" *Burns*, 501 U.S. at 136 (quoting Fed. R. Crim. P. 32(a)(1)). The court emphasized that the purpose of Rule 32 was "focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Burns*, 501 U.S. at 136. "The right to be heard has little reality or worth unless one is informed that a decision is contemplated." *Id.* at 136 (internal quotation omitted).

This reasoning applies with equal force to adjustments in a guidelines sentence. An adjustment often has the effect of increasing the actual sentence that a defendant receives. As "sentencing is arguably the most critical stage of the criminal proceeding,..., and because an adjustment ... is a 'factor important to the sentencing determination,' i.e., it may very likely result in an increase in the defendant's sentence, the defendant is entitled to notice." *United States v. Jackson*, 32 F.3d 1101, 1106 (7th Cir. 1994) (citing USSG § 6A1.3(a), which refers to an enhancement for abuse of trust). Thus, "when a trial judge relies on a Guideline factor not mentioned in the PSR nor in the prosecutor's recommendation, contemporaneous notice at the sentencing hearing ... fails to satisfy the dictates of Rule 32." *Jackson*, 32 F.3d at 1106. Moreover, "a defendant and his counsel are entitled to know in advance of the sentencing hearing of the factual grounds and the basis in the Sentencing Guidelines for a proposed enhancement." *Jackson*, 32 F.3d at 1107 n. 4. "Only when equipped with knowledge of both the facts and the Guideline section at issue will defense counsel be prepared to defend his client." *Jackson*, 32 F.3d at 1107 n. 4.

Notice of the factual basis for an adjustment based on obstruction of justice resting on alleged perjury aids in

implementing the Policy Statements of the Guidelines regarding disputed issues at sentencing. The Guidelines recommend "the narrowing and resolution...of issues in dispute in advance of the sentencing hearing." USSG § 6A1.2, p.s. The Guidelines also provide that "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor." USSG § 6A1.3(a), p.s. The provisions of Rule 32 allow this adversarial presentation and narrowing of issues by requiring disclosure of the Presentence Report 35 days in advance of sentencing (Fed. R. Crim. P. 32 (b)(6)(A)), requiring the parties to submit objections and responses to the Report within 14 days after receiving it (Fed. R. Crim. P. 32 (b)(6)(B)) and requiring a further effort to resolve the factual differences by the presentence report writer at least 7 days before the hearing (Fed. R. Crim. P. 32 (b)(6)(C)). This procedure, which is substantially more formal than pre-guidelines practice, allows the narrowing of issues by giving the parties' notice of the factors that may be "important to the sentencing determination."

The need for adequate notice of the factual predicate for an enhancement is demonstrated by this case. The presentence report recommended a two-level increase for obstruction of justice based on perjury at trial because Mr. Dvorak "denied his guilt under oath [and] contradicted testimony by Burchell found by the jury to be truthful." (Sealed A. 14a). The Report identified no specific false testimony. The defense objected to the Report because it "identifies no specific testimony that was supposedly false." (Sealed A. 47a). Rather than meet these objections, the presentence report writer merely emphasized the evidence that supported an enhancement based on document destruction. (Sealed A. 80a).

Similarly, neither the government's original sentencing memorandum, nor its supplemental sentencing memorandum filed in response to Mr. Dvorak's sentencing memorandum, identified any specific instances of the allegedly false

testimony. (A. 148a-186a, 220a-224a). The government essentially abandoned its claim that Mr. Dvorak had perjured himself. The government argued instead that an enhancement was warranted because of document destruction, but not for false testimony.

When defendant arrived at the sentencing hearing, the obstruction of justice issues had been focused solely on alleged document destruction. When the district court announced that it would not find an obstruction based on the document destruction, but wanted to hear argument on the perjury point, the court posed a question that had caught both sides by surprise. The court did nothing to alleviate the surprise as it did not focus the parties on any particular allegedly perjurious statements. In response, the government could offer little more than vague generalities about supposed perjury. The prosecutor's sole arguments were that "there [were] numerous instances . . . just direct testimony . . . in direct contradiction to what Mr. Burchell said. So we think that obstruction, this is a clear case of it." (A. 52a).

Counsel for the defendant objected during the sentencing hearing to the lack of notice of "what precisely was the false testimony he was supposed to have given." (A. 37a). As no one had identified any particular portion of testimony, counsel could not respond to the suggestion of perjury except by arguing that the jury could have believed Mr. Dvorak's testimony about his thoughts but still found him guilty on a "willful blindness" theory. (A. 38a-39a).

When pressed for a specific example, the prosecutor could refer only to a single conversation between Burchell and Mr. Dvorak, which Mr. Dvorak denied, and which the district court did not use as a basis for the perjury enhancement.

The jury could just as easily have credited Burchell's testimony where it was consistent with Mr. Dvorak's, and rejected the rest, particularly given the evidence concerning Burchell's badly damaged credibility. An admitted forger and

thief, Burchell admitted that he lied thousands of times concerning his scheme at the DEA. (F.C.A. 277-278). Indeed, the supposed conversation about a camper, which Burchell stated involved a conversation about his retirement to Bracey, Virginia, was one that Burchell had not mentioned to the prosecutor or the FBI agents despite his being debriefed more than ten times before trial. Burchell admitted that he made up this testimony for the trial itself. (F.C.A. 308-311).

The sentencing judge, however, was obviously thinking of specific examples, which he did not identify for the parties until his ruling. Declining to rely on the prosecutor's example, the court ruled that the obstruction of justice enhancement was warranted, based on "the defendant's statement that he was not only unaware of the deviousness and culpability of Burchell, but indeed he thought, to the contrary, that these were perfectly legitimate purchases from the DEA." (A. 56a-57a). This alleged factual predicate appeared nowhere in the Presentence Report, the government's submissions, the prosecutor's argument at sentencing, or the judge's opening remarks at sentencing.

Mr. Dvorak sought to overturn his sentencing enhancement in the Fourth Circuit precisely on the grounds that the district court had failed to give him notice of what specific testimony would underlie any potential enhancement for obstruction of justice. *See* Fourth Circuit Brief for Appellant at 49, 52-54; Fourth Circuit Reply Brief of the Appellant at 20-26. The Fourth Circuit merely affirmed without addressing the argument. (A. 1a-3a).

The Fourth Circuit erred by upholding a sentencing enhancement where Mr. Dvorak received no notice of the specific testimony that the district court found to be perjurious. The Fourth's Circuit's ruling was error because it upheld a sentencing where Mr. Dvorak lacked any chance to prepare for the allegation and meet it with evidence from the trial. An accusation of perjury must refer to some specific instances of false testimony. Without knowing what item of testimony that the district court might find false and

perjurious, the defendant cannot marshal contrary evidence and seek to dissuade the court of its conclusion. The trial court's failure to give notice to Mr. Dvorak left him defenseless against the imposition of additional punishment without any realistic chance to meet or refute it. Mr. Dvorak was deprived of his right to "full adversarial testing of the issues and an opportunity to comment," *see Burns*, 501 U.S. at 136, as he had no notice of this basis for enhancement.[6] *Compare United States v. Hatney*, 80 F.3d 458, 461 (11th Cir. 1996) (notice to defendant of obstruction of justice enhancement based on perjured trial testimony was sufficient because the Presentence Report included the specific statements alleged to have been perjurious, along with the specific testimony of other witnesses which contradicted defendant's testimony).

This issue is of great practical importance in the administration of justice by the courts. In the fiscal year 1999, the most recent year for which data is available, approximately 57,000 adjustments were made to individual defendants' sentences. Approximately three quarters of these adjustments were given for acceptance of responsibility. Thus, one quarter of the total adjustments given encompassed all other types of adjustments. Not insignificantly, approximately 1,666 of these remaining adjustments were given for obstruction of justice. United States Sentencing

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[6] In contrast, the resolution of the document destruction issue demonstrates the importance of notice of the factual predicate supporting an enhancement. The presentence report and addendum identified a specific document that Mr. Dvorak allegedly destroyed. In response to Mr. Dvorak's objection that there was no evidence to support the alleged document destruction, the probation officer provided additional factual support for the alleged document destruction. (Sealed A. 80a). The government's sentencing memorandum also focused on the alleged document destruction. (A. 148a-186a). The presentence submissions were detailed enough that the court did not need to address these grounds for the enhancement before rejecting it out-of-hand at sentencing. (A. 37a).

Commission, 1999 Sourcebook of Federal Sentencing Statistics (1999), Table 18 ("Offenders Receiving Each Chapter Three Guideline Adjustment, Fiscal Year 1999").

B. Lack of Notice about the Factual Basis for An Enhancement Based on Perjury Violates the Due Process Clause

The Fifth Amendment Due Process clause unmistakably applies to sentencing proceedings. *Jones v. United States*, 526 U.S. 227, 242 n. 6 (1999); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion).; *United States v. Rone*, 743 F.2d 1169, 1171 (7th Cir. 1984) ("convicted defendants . . . have a due process right to a fair sentencing proceeding"). "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Gardner*, 430 U.S. at 358; *Tucker v United States*, 404 U.S. 443, 447-49 (1972)(The Constitution forbids a sentence that rests on "misinformation of constitutional magnitude"). *See also Apprendi v. New Jersey*, 530 U.S. 466 (2000) (applying the due process clause to sentencing procedures, stating that "under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.").

A fundamental component of Due Process is notice of the factual basis for the imposition of sentence. *Burns* recognized the significance of the notice issue in construing Rule 32. As the court noted, "[w]ere we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Burns*, 501 U.S. at 138. "A fundamental requirement of due process of law in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford

them an opportunity to be heard." *Mullane v. Hanover*, 339 U.S. 306, 314 (1950) (citations omitted). "The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and the opportunity to meet it'." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). "The notice must be of such a nature as reasonably calculated to convey the required information." *Mullane*, 339 U.S. at 314 (citations omitted) (emphasis added). "Mere gestures" are not due process. *Mullane*, 339 U.S. at 314.

The constitutionally deficient notice in this case arose because no one - not the presentence report writer, the prosecutor or the court - specified in advance the portion of Mr. Dvorak's testimony that was supposed to be perjurious. We do not claim to have lacked notice that perjury at trial in general may result in an adjustment to a sentence for obstruction of justice, as the Guidelines specify that "committing, suborning, or attempting to suborn perjury" may constitute an obstruction of justice. USSG § 3C1.1, comment. (n. 4(b)). Nor do we claim that we lacked notice about some evidence on which the sentencing court relied, such as an undisclosed transcript from another trial, *compare United States v. Berzon*, 941 F. 2d 8, 19 (1st Cir. 1991) or secret letters to the court that were not disclosed to the defendant. *compare United States v. Hayes*, 171 F. 3rd 389, 392 (6th Cir. 1999). Here, Mr. Dvorak lacked notice about which testimony was alleged to be perjurious.

While the Guidelines permit a sentencing enhancement for perjury during the trial, "not every accused who testifies at trial and is convicted will incur an enhanced sentence under 3C1.1 for committing perjury." *See Dunnigan*, 507 U.S. at 95. As this Court held in *Dunnigan*,

> an accused may give inaccurate testimony due to confusion, mistake, or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress, or self-defense. Her testimony may be truthful, but the jury may

> nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent.

Id. at 98.[7] *See also* USSG § 3C1.1, comment. (n. 3) ("inaccurate testimony . . . sometimes may result from confusion, mistake, or faulty memory and thus, not all inaccurate testimony . . . necessarily reflects a willful attempt to obstruct justice"). *United States v. Moore*, 484 F.2d 1284, 1287-1288 (4th Cir. 1973) ("a verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence").

Nor did Mr. Dvorak have notice from the verdict alone that the jury must have found his testimony perjurious. In this case, the government relied heavily on a theory that Mr. Dvorak was "willfully blind" to Burchell's criminal conduct. The government argued that, despite Mr. Dvorak's denial that he knew of Burchell's criminal purpose, Mr. Dvorak was guilty because he had turned a blind eye to Burchell's conduct. Under that theory of the case, the jury may have found that Mr. Dvorak's testimony was entirely truthful, but nonetheless, "insufficient to excuse criminal liability or prove lack of intent." *Dunnigan*, 507 U.S. at 98.

Even if the jury did not find Mr. Dvorak's testimony to be accurate, it hardly follows that his testimony was perjurious. Under the Guidelines, the mere fact that Mr. Dvorak "denied his guilt under oath" does not support a two-level enhancement. *See* USSG § 3C1.1, comment. (n. 2) ("a defendant's denial of guilt [other than a denial of guilt under oath that constitutes perjury] . . . is not a basis for application of this provision"). While Mr. Dvorak's right to testify does not create a right to commit perjury, the enhancement may not

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[7] This Court defined perjury under the federal perjury statute, 18 U.S.C. § 1621, as "[a] witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *Dunnigan*, 507 U.S. at 94.

be given simply because a defendant testifies on his own behalf and the jury disbelieves him. *United States v. Holt*, 969 F.2d 685, 688 (8th Cir. 1992) (citations omitted). A perjury enhancement under the Guidelines should rest on something more than simple contradiction between the testimony of witnesses. The simple disagreement between the testimonies of two witnesses would not support a conviction for perjury for either of them. *Hammer v. United States*, 271 U.S. 620, 626 (1926) ("the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused"); *Weiler v. United States*, 323 U.S. 606, 607 (1945) (refusal to instruct on the "two witness rule" was error).

Without notice of the testimony that is alleged to be perjurious, a defendant would have to anticipate and rebut every possible instance of possible perjury "in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose" to base the perjury enhancement, a result the *Burns* Court set out to avoid. *Burns*, 501 U.S. at 137. In this case, for example, without the identification of the specific allegedly perjured statements, defense counsel would have to comb every page of Mr. Burchell's testimony (approximately 220 pages) and every page of Mr. Dvorak's testimony (approximately 112 pages) to determine exactly where his testimony contradicted testimony of Burchell.

Mr. Dvorak received an increased sentence without having notice in advance of his sentencing hearing of the factual basis for it. This deprivation of his liberty, without notice, deprived him of Due Process.

C. This Court Should Grant Certiorari Because of the Conflict Among the Circuits on the Necessity of Instructing a Jury that Good Faith is a Defense to Fraud Charges

"As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists

evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). The refusal to give an instruction on the central tenet of the defense, namely, Mr. Dvorak's good faith belief in the propriety of his actions,[8] was reversible error.

The record is filled with evidence to show that Mr. Dvorak believed in good faith that he was assisting the DEA, not defrauding the DEA. Mr. Dvorak testified that he believed he was helping the DEA, and that Burchell asked him to help the DEA. This belief was supported by facts. Burchell actually worked for the DEA, and ordered goods from Ritz by transmitting DEA purchase orders that were signed by contracting officers. Ritz received payment by government checks. Ritz installed antennas at the DEA headquarters in two different years, and duplicated 8,000 copies of a training tape about DEA equipment. Burchell ordered many items that are standard fare for government agencies, such as video projectors, desktop computers, printers, and software. Relying on the comments of his older brother, a former CIA employee, Mr. Dvorak believed the non-standard items that Burchell ordered were ones that the DEA would use for undercover operations or as bribes elsewhere in the world. Other Ritz employees had seen ostensibly innocent items, such as pinball machines and lamps, being outfitted with surveillance equipment in a DEA workshop.

The jury instructions did not inform the jury on the central premise of the defense, namely, that Mr. Dvorak's honest belief that he was helping the DEA would require the jury to acquit him on the wire fraud and false statements counts. Although other instructions stated that the government had to prove Mr. Dvorak acted "willfully," instructing a jury

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[8] Good faith is an absolute defense to charges of false statements and wire fraud. *United States v. Bakker*, 925 F.2d 728, 738 (4th Cir. 1991); *United States v. Mancuso*, 42 F.3d 836, 846-47 (4th Cir. 1994). The government has not argued otherwise.

that the government must prove that a defendant intended to commit an offense is quite different from explaining to the jury how the defendant can legitimately counter the government's proof of this essential element of the crime.[9]

The jury received no guidance from the court on how to evaluate the defense that Mr. Dvorak believed, based on the comments and conduct of Burchell, that he was assisting the DEA. For example, the jury received no instruction about whether Mr. Dvorak's beliefs have to be objectively reasonable or merely subjectively sincere.[10] It would be unfair to expect a jury to divine that the law required no proof that Mr. Dvorak's beliefs were reasonable. Indeed, in a closely analogous area, the federal appeals courts disagreed among themselves on whether good faith alone provided a defense to a willful failure to file a tax return[11] or whether the refusal had to be objectively reasonable. This Court's decision *in United States v. Cheek*, 498 U.S. 192 (1991), which held that the defense to that charge required no proof of objective reasonableness, resolved this split in the circuits. *See* 498 U.S. at 197. Jurors cannot be expected to infer that "willfulness"

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[9] The trial court's refusal to give this instruction conflicted with long-standing precedent in the Fourth Circuit and elsewhere, that requires jury instructions in fraud cases where the defendant asserts that he lacked criminal intent because he relied on the advice of others. *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981) (reliance on expert); *Etheridge v. United States*, 932 F.2d 318, 321 (4th Cir. 1991) (reliance on government official); *United States v. Johnson*, 537 F.2d 180 (4th Cir. 1964) (advice of counsel).

[10] The proposed instruction would have informed the jury "a person who acts on a belief or opinion honestly held is not punishable under either [the wire fraud or false statements] statutes merely because the belief or opinion turns out to be inaccurate, incorrect or wrong." (A. 87a-88a). The proposed instruction thus informed the jury that Mr. Dvorak's belief needed to be only "honestly held" rather than objectively reasonable.

[11] 26 U.S.C. § 7201 punishes anyone who "willfully attempts in any manner to evade or defeat any tax imposed by this title."

may be negated by a subjective good faith belief, without proof of reasonableness, when the very same issue divided the federal appeals courts. It is unrealistic to expect a jury to know the right answer when federal judges disagree on it.

The government's brief to the Fourth Circuit argued that the willfulness instruction presents the "good faith" defense by stating the government's burden to prove that Mr. Dvorak acted "voluntarily and intentionally and not because of a mistake or accident or other innocent reason." The Fourth Circuit seemed to accept this reasoning, stating that the jury instructions were "adequate." The government argued that the single word "mistake" was adequate to inform the jury that Mr. Dvorak's mistaken belief in the propriety of his actions would constitute a defense. A jury, however, may have interpreted that "mistake" to refer to mistaken actions, such as delivering the wrong goods, rather than mistaken thoughts by Mr. Dvorak. The instruction was insufficiently specific to explain how Mr. Dvorak might "legitimately counter the government's proof" under *Miller* by showing his belief that he was helping the DEA, not cheating it. The instruction was simply inadequate to "advise the jury clearly regarding the law to be applied in the case," *United States v. Lewis*, 53 F.3d 29, 33 (4th Cir. 1995) because it included no explicit reference to Mr. Dvorak's good faith. *Compare United States v. Fowler*, 932 F.2d 306, 315-317 (4th Cir. 1991) (no requirement for separate good faith instruction where court also instructed jury that it would be a defense if the defendant "believed he had authority" to act as he did, and that his belief was "reasonable under all the circumstances.")

The district court compounded the damage to Mr. Dvorak by giving a "willful blindness" instruction that the jury could find the requisite knowledge by Mr. Dvorak if it found beyond a reasonable doubt his "deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact." (A. 91a-92a). As there was little evidence of Mr. Dvorak's direct knowledge of Burchell's intent, the prosecutor's closing argument focused on willful

blindness. (A. 114a-115a). The jury likely found Mr. Dvorak guilty based on that instruction. The court's instructing on "willful blindness" but not on "good faith" meant that the jury received imbalanced instructions that told them how they might convict but not how they might acquit.

The Fourth Circuit's decision conflicts with the decisions of other circuits. The Eighth and Tenth Circuits require a separate good faith instruction where defendant requests the instruction, the instruction is correct, the government does not object to the wording or the giving of the instruction, and the evidence supports giving the instruction. *See United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985) (wire fraud); *United States v. Ammons*, 464 F.2d 414 (8th Cir. 1972);[12] *United States v. Haddock*, 956 F.2d 1534 (10th Cir.), on rehearing 961 F.2d 933 (10th Cir. 1992); *United States v. Hopkins*, 744 F.2d 716 (10th Cir. 1984) (en banc). These Circuits require a good faith instruction because "general instructions on willfulness and intent are insufficient to fully and clearly convey a defendant's good faith defense." *Haddock*, 956 F.2d at 1547 (citations omitted); *see also Hopkins*, 744 F.2d at 718.

The Second Circuit requires a balancing instruction when a court instructs, as here, on willful blindness. *See, e.g., United States v. Sicignano*, 78 F.3d 69, 70-71 (2d Cir. 1996) (Second Circuit has "repeatedly ruled" that when the court instructs on conscious avoidance, it must advise jury that it cannot find knowledge of a fact if defendant actually believed the contrary; "failure to include that proviso improperly permits the jury to convict a defendant who honestly believed that he was not engaging in illegal activity"); *United States v. Bright*, 517 F.2d 584, 588 (2d Cir. 1975) (failure to include balancing instruction to conscious avoidance was reversible error; "instruction as given was insufficient to give the jury

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[12] The Eighth Circuit has held that a separate good faith instruction is not required in prosecution under 18 U.S.C. § 1001 because it does not require proof of any intent to deceive. *United States v. Hildebrandt*, 961 F.2d 116, 118 (8th Cir. 1992).

the proper balance required" due to "the lack of juxtaposition of the choices available"); *United States v. Rodriguez*, 983 F.2d 455, 456 (2d Cir. 1993) (willful blindness instruction must include language that defendant may not be convicted if he actually believes that a particular fact does not exist; language that "a showing of negligence, mistake, or even foolishness, on the part of the defendant, is not enough to support an inference of knowledge") (citation omitted). "An instruction that the jury cannot find knowledge on the basis of mistake or accident is not an acceptable substitute for the balancing charge which incorporates the concept of actual belief." *Sicignano*, 78 F.3d at 72. Without the balancing instruction, the charge "create[s] an unacceptable risk that the defendant might be convicted in spite of his actual belief" in the propriety of his actions. Id.

CONCLUSION

This Court should grant the petition for certiorari.

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